No. 281.

Brf. of Rouse & Grant for

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Supreme Court of the United States

OCTOBER TERM, 1900.

No. 281.

CITY OF NEW ORLEANS, PETITIONER,

versus

JOHN G. WARNER, ET ALS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENTS.

STATEMENT.

The original bill (R. p. 1) filed in this case by John G. Warner in behalf of himself and all others holders of drainage warrants similarly situated, was brought on three drainage warrants, part of the whole amount issued in payment of the consideration of the agreement of sale and compromise executed on the 7th of June, 1876. The city in its answer to the bill (R. p. 20), did not set

up any objection to the validity of this agreement, but on the contrary, alleged that (R. p. 24) "the General Assembly of the State of Louisiana by Act No. 16 of 1876 was constrained to dispense with the service of the company and its assignee (Van Norden), and to authorize the purchase by this defendant, of the dredge boats, rights, franchise, and other property of the company for a price in drainage warrants, delivered to Warner Van Norden, the said assignee, payable only from drainage taxes, and this act was followed by said purchase from and surrender of the franchises by said company, and its assignee, as shown by the said legislative act, and act of purchase, a copy of which is filed with the bill, to which reference is made."

The regularity of the agreement and its validity in law and fact were not denied, nor was it claimed that the enabling act of 1876 did not authorize the city to make the agreement and issue the warrants in discharge of its considerations; nor that the damages had not been appraised.

The Circuit Court of Appeals passed upon all the defenses pleaded in the answer, and found and decreed (R. p. 90) that the city was indebted to the complainant Warner for the amount of the three warrants issued under the agreement, payable out of drainage assessments; decreed that the drainage assessments and taxes were a trust fund in the hands of the city for the purpose of paying the complainant and other holders of the same class of warrants issued under the act of sale from Van Norden, transferee, to said city, under authority of the Act 16 of 1876, and ordered an account taken of the taxes; ordered notice to be given by the Master to all holders of warrants so issued, to establish their claims before him, and that all persons who shall establish their claim will be entitled to absolute judgments for the amounts found due them, and be entitled to the full benefit of the proceeding. This decree (R. p. 99) was affirmed in all respects by this court in New Orleans vs. Warner, 175 U. S. 120.

The appellees established their claims, all based on warrants of the same class as those held by Warner, issued in payment of

the consideration of the agreement of sale and compromise, which were allowed by the Master. To this allowance the city filed before the Master, substantially, the following exceptions (R. p. 108):

1st. That the Master erred in charging the city with the whole of the uncollected assessments against private persons and property. (But this has been abandoned.)

2nd. That the advantages of the decree of reference, extend only to such warrants as were issued in payment of the price of the property purchased by act before Legardeur, Notary Public, dated June 7, 1876, amounting to $153,750, as shown by the inventory and appraisement of T. S. Hardee, City Surveyor; that the balance of the warrants issued under said act were not purchase warrants in the sense of the opinion and decree of the Court of Appeals and of the Supreme Court; that such balance of said warrants were mostly issued in settlement of a claim for damages; that of said warrants $20,000 were issued in payment of work, done by Van Norden in digging canals which had not been measured at the time of the passage of said act, as to which the decision in Peak vs. New Orleans is *res adjudicata* in favor of the city; that no warrants issued in excess of the value of the tangible property should be considered as coming within the said opinion and decree of this court and of the Court of Appeals.

These exceptions were renewed in the Circuit Court (R. p. 143), with the modified statement that the $20,000 of warrants were issued in satisfaction of drainage taxes collected and appropriated by the city for its general purposes.

It is to be noted here that the only objection made to the allowance of warrants supposed to have been issued in settlement of the claims for damages and misappropriation of drainage taxes, is, that such claims do not come within the decision and decrees of the Court of Appeals, as affirmed by this court. But the exceptions do not charge or allege as a ground of defense that the city did not have authority under Act 16 of 1876, to settle and pay the claims, and purchase the franchises of the Canal Company, nor

that there was no valid or sufficient appraisement of the damages.

The Master was of the opinion (R. p. 106) that this court in adjudging in favor of Warner, necessarily decided the validity of all the warrants issued in discharge of the consideration of the agreement, the holders of which had come in and accepted the benefit of the decree; and further that Section 1 of Act 16 of 1876 conferred upon the city ample authority to compromise all claims of the Canal Company, and its transferee, arising out of its execution of the work under the provision of Act 30 of 1871, even if the question had not been already determined by this court, and accordingly overruled the exceptions of the defendant to his report. The Circuit Court, following the report and opinion of the Master, but without filing a written opinion, overruled the exceptions, and made the decree in favor of the warrant holders, now sought to be reviewed here.

The city appealed to the Circuit Court of Appeals, assigning, in substance, the following errors (R. p. 150):

1st. That the Circuit Court erred in overruling its exceptions to the Master's report.

2nd. That only the warrant issued in payment of the price of the tangible property purchased under the agreement, and appraised at $153,750, pursuant to Act 16 of 1876, should be admitted as debts or liabilities of the city; and that warrants issued in excess of said amount, not being purchase warrants, should be excluded from the benefits of the decree.

3rd. That the warrants for $20,000 issued in satisfaction of drainage taxes collected and appropriated by the city, not being purchase warrants in the sense of the decision of the Supreme Court, were not entitled to the benefit of that decision.

4th. That all of the warrants issued in excess of $153,750 (the value of the tangible property), for damages, etc., were issued without authority of law, the said Act 16 of 1876 furnishing no authority therefor; and that even if it were otherwise, there was no appraisement of the damages, which was a condition precedent

under said Act, to any settlement thereof; that so far as any of said warrants may have been issued in payment of the price of the franchises, the same was a pure fiction, as the acquisition thereof was the assumption of a burden, and not the acquisition of property of value. That the court should have refused to allow any warrants in excess of $153,750.

5th. That the court should have allowed said warrants, in numerical order, up to $153,750, and rejected all others.

6th. That the Circuit Court erred in refusing to separate in this manner, the valid from the illegal warrants, and in dealing with the whole issue as a unit.

7th. That the Circuit Court erred in holding that the question raised by the exceptions to the Master's report were decided adversely to the city by the prior decrees of the Circuit Court and Supreme Court in this cause.

The assignments made here, in the petition for *certiorari* (R. p. 80 to 89), are substantially the same.

It will be observed that but two defenses to the claims of the intervenors were set up in the exceptions filed by the city to the Master's report, which were subsequently renewed in the Circuit Court. 1. That the advantages of the decree of reference, extend only to such warrants as were issued in payment of the price of the tangible property, as shown by the appraisement, amounting to $153,750, and that the balance of the warrants issued in settlement of the claims for damages, not being purchase warrants, in the sense and meaning of the opinion and decree of the Circuit Court of Appeals, and of the Supreme Court, are not entitled to the benefit thereof. 2. That the $20,000 of warrants issued in satisfaction of drainage taxes misappropriated by the city being for taxes collected prior to June 6, 1876 (the date of the purchase), they should not be allowed, and that in any event, the decree in Peak vs. New Orleans in No. 11,614 U. S. Circuit Court, is *res adjudicata* in favor of the city.

The exceptions filed to the Master's report, subsequently re-

newed in the Circuit Court, as will be seen from a casual examination of them (R. p. 108), set up no new or special defenses to the claims of the intervenors in addition to those contained in the answer to the Warner bill, common to all the warrants. They merely protested that the intervenors were not entitled to the benefit of your Honors' decision in New Orleans vs. Warner, 175 U. S. 120. The Master and the Circuit Court therefore tried and determined the claims of the intervenors on the same proofs, and upon the same issues of law and fact which were the basis of the decision of this court in the above case.

But in the assignment of errors filed on its appeal from the decree of the Circuit Court (R. p. 150), the city, for the first time, alleged that the Act of 1876 did not authorize it to compromise the claims for damages, and that if it did, there was no appraisement of the damages which was a condition precedent to a valid contract of compromise. As these defenses were imported into the record by the assignment of errors on the appeal taken to the Court of Appeals after the final decree, they were never brought to the attention of the Master nor to the judge of the Circuit Court, nor passed on by them. The Court of Appeals, for this reason, did not consider them, and affirmed the decree of the Circuit Court. The city now complains here that the Master and the two Courts below, erred in the rulings they are supposed, or assumed, to have made on these two defenses, which were not legally brought to their attention as issues in the case, and which they were not required to consider or decide.

Argument.

I.

The exceptions filed by the city to the report of the Master, and renewed in the Circuit Court, amount simply to a protest, or argument, that the holders of the warrants supposed to have been issued in discharge and compromise of the claims for damages, and for the misappropriation of drainage taxes, are not entitled to the

advantages of the decision of this Court rendered in favor of John G. Warner on the warrants of the same kind and class held by him.

The city admits in the exceptions, that the warrants supposed to have been issued in payment of the price of the dredge boats and machinery, numbered from 313 to 333, and amounting to $153,750, are valid, and that it is bound in respect to these warrants by the decree in favor of Warner, and the decision of this Court affirming the same, as found in New Orleans vs. Warner, 175 U. S. 120; but insists that it is not bound as to the warrants numbered from 334 to 402, supposed to have been given in compromise of the claims for damages and for misappropriation of drainage taxes.

The exceptions set up no special defenses in addition to those alleged in the answer to the Warner bill, which was based on the warrants Nos. 379, 380, 381 (given, according to the theory of appellant, for part of the claim for damages), upon which the former decree of the Court was rendered.

The case was, therefore, necessarily tried before the Master and in the Circuit Court, as between the city and the intervenors who held other than the alleged purchase warrants, solely upon the defenses set up in the answer to the Warner bill, coupled with a protest that the decision of this court in the main cause was not binding on the city as *res adjudicata*. The case was heard upon the same evidence (List of evidence, R. p. 141), and the same issues of law and fact, upon which this court affirmed the decree rendered in favor of John G. Warner and all other holders of warrants of the same class. As the Warner warrants in numerical order fall within those issued, according to the theory of the city, for damages and misappropriation of drainage taxes, it is difficult to see why all that class of warrants are not entitled to the full benefit of the former decision of this court.

If the decree affirmed in New Orleans vs. Warner, 175 U. S. 120, is not strictly an adjudication in favor of all holders of the warrants issued in discharge of the consideration of the agreement

of purchase and compromise, the decision of this court upon the same facts and issues, is most certainly *stare decisis*.

It is true that the question of the validity of the warrants supposed to have been issued otherwise than for the price of the dredge boats and machinery, was not expressly decided by this Court on the former appeal, but this was because that question was not raised by the defendant's answer, which admitted their legality without qualification, by alleging that the city purchased "the rights, franchises and other property" of the Canal Company and Warner Van Norden, transferee, under the contract of June, 1876, by authority of the Act No. 16 of the Legislature of Louisiana (R. p. 24).

The case of the intervenors having been tried upon the same issues of law and fact before the Master and the Circuit Court, the Court of Appeals was, therefore, clearly right in holding that the city was concluded by the decision of this court on the similar warrants involved in the Warner appeal. Decrees rendered in cases of this character have always been held to be for the benefit of all others similarly situated, in behalf of whom the bill was brought.

The rule is clearly stated by the court in Hammond vs. Hammond, 2 Bland (Md.), 362, as follows: "The principle in such cases is that, substantially, a bill by a creditor in behalf of himself and all others, or a suit by any one in which all the creditors may be represented, and allowed to come in and obtain satisfaction, is considered as making all of them parties to it, and that the decree is in the nature of a judgment for them all."

Brook vs. Gibbons, 4 Page 374.

Thompson vs. Brown, 4 Johns. Ch. 619.

Kerr vs. Blodgett, 48 N. Y. 62.

This principle is recognized in the case of Richmond vs. Ivens, 121 U. S. 27, where this court held that the filing of a bill by one creditor for himself and in behalf of all others for the administration of the estate of a debtor, operates as a suspension of the statute of limitations as to the claims of all who come into the cause

and claim the benefit of the proceeding. Suits of this character are of the same class as those brought by one inhabitant to establish in behalf of all a right of common against the Lord of a manor, or a right of fishery. On this subject, we refer the court to the exhaustive discussion and review of the decisions to be found in Vol. 1 of Pomeroy's Eq. Jur., p. 243, under the head of "Multiplicity of Suits".

See also opinion of Mr. Justice Harlan in Osborn vs. Wisconsin Central R. Co., 43 Fed. Rep. 824.

We do not claim that a decree in such cases in favor of the complaining party would cut off any special defenses the defendant might have against a particular creditor, but it seems to us clear, on principle, that the decree must be held conclusive as to every issue common to all, which has been necessarily litigated and determined, otherwise such a decree decides nothing, and is but the beginning of a new contention with every intervenor, actually creating, instead of preventing multiplicity of suits.

In the present case all the warrants, although each is numbered and for a different amount, were issued as a unit in discharge of the consideration of a single contract, and delivered to Warner Van Norden, from whom the present holders derived title. Whatever defenses the city has to one of these warrants is applicable to all. These having been fully heard and decided in the Warner appeal, and no new or special defenses having been set up since against the intervenors, the decision ought to be final and binding on the city, and we submit that the Court of Appeals did not error so holding. One of the errors assigned by the city in its petition for the former writ of *certiorari* (R. p. 79, par. 17), complained that the Court of Appeals erred in giving the advantage of the decree to the holders of the other warrants similar to those of Warner. Yet this court affirmed the decree (R. p. 99), and necessarily considered and decided this very question.

The only new and special defense made in the exceptions filed before the Master was to the allowance of sixteen thousand dollars

of warrants, part of the $20,000 issued in settlement of the misappropriation of $24,000 of drainage taxes collected and misappropriated by the city, on the ground that these warrants were not purchase warrants, within the sense of the former decision; and that the decision in the case of Peake vs. New Orleans was *res adjudicata* (R. p. 143). But of what it is *res adjudicata* is not stated, nor is it alleged that any of these warrant holders were parties to that cause.

The Master was therefore perfectly correct in overruling the exceptions as to these warrants, and so was the Circuit Court in confirming his report.

II.

As the case of the intervenors was tried before the Master, and in the Circuit Court, upon the same issues, and upon the same proofs that were before this court in the Warner appeal, we submit that the Circuit Court of Appeals was entirely correct when it declared that the whole case had been decided by your Honors in New Orleans vs. Warner, 175 U. S. 120, notwithstanding the protest of the city in its exceptions to the Master's report that the intervenors were not entitled to the benefit of that decision.

It would seem that the city did not discover the fallacy of its contention until after the case had been tried in the Circuit Court. Then, for the first time, as an afterthought, it set up two new and special defenses in the assignment of errors filed in its appeal from the decree of the Circuit Court (4 errors, R. p. 150), to the effect that the Act of 1876 did not authorize the city to compromise the claims for damages, and that the damages had not been appraised; and complained that the Circuit Court erred in not sustaining them. It is also complained here that the Court of Appeals erred in not reversing the decree of the Circuit Court on these grounds. As these defenses were not set up in the answer to the bill, nor in the exceptions before the Master, which were renewed in the Circuit Court, and were not brought to the attention of the trial

court, nor passed on, it is elementary that they cannot be made the basis of any reversible error in an appellate court.

The proposition that new defenses cannot be imported into a case for the first time in an appellate court, is so firmly established in our jurisprudence as to hardly need argument in support of it. Where such supposed and fictitious defenses have not been passed on by the trial court, there is nothing in the record open to review here.

Where the record shows that a particular ground of defense raised for the first time in the Supreme Court, was not brought to the consideration of the Circuit Court, it will not be considered here.

Bell vs. Bruen, 1 H. 169.

In a patent case it was insisted here that a reissue was void because it was not for the same invention as the original patent, but the Court refused to consider it, on the ground that the point not having been taken in the Court below, there was nothing to be reviewed here.

Kline vs. Russell, 19 W. 433.

So where the only issue made in the Circuit Court was whether certain imported strips of iron were band iron subject to a duty of 35 *per cent. ad valorem*, it was held that the plaintiff could not here raise the question whether it was subject to a specific duty of 1¼ cents per pound, the question not having been raised in the Court below.

Badger vs. Ranlett, 106 U. S. 255.

In the case of Coffey vs. United States, 116 U. S. 436, the plaintiff raised the question of the sufficiency of an information *in rem* for the violation of the internal revenue laws, by an assignment of errors filed here, but the court held that this question could not be considered, as it had not been formally raised in the Circuit Court.

Says the Court in Ansbro vs. United States, 159 U. S. 695:

"An assignment of errors cannot be availed of to import

questions into a cause which the record does not show were raised in the court below, and ruling asked thereon, so as to give jurisdiction to this court, under the 5th Section of the Act of March 3, 1881."

Cornell vs. Green, 163 U. S. 75.

Muse vs. Arlington Hotel Co., 168 U. S. 430.

The answer of the city, as we have shown, admitted the execution of the agreement of purchase and compromise under authority of the Act 16 of 1876, without pleading that it was *ultra vires*, or suggesting that there was not a sufficient appraisement, so that no defense was made or decided on these grounds in the Circuit Court, nor were these questions raised by the exceptions filed to the Master's report which set up no new defense, but merely protested that the intervenors were not entitled to the advantages of the former decision of this court.

Exceptions to a Master's report are treated as in the nature of a special demurrer, and must state article by which the parts of the report intended to be excepted to. Only the specific errors thus pointed out will be considered. They constitute the issues to be tried.

Story vs. Livingston, 13 Pet. 359.

"This Court will not review a Master's report upon objections taken here for the first time".

McMicken vs. Perin, 18 H. 507.

Commenting on this rule stated in McMicken vs. Perin this court said in Topliff vs. Topliff, 145 U. S. 156, that,

"In affirmance of this principle Rule 21 (Sec. 2) requires that 'when the error alleged is to a ruling upon the report of the Master, the specification shall state the exception to the report and the action of the Court upon it.'

"This presupposes that the particular exception relied upon was taken in the court below and was passed upon by the court adversely to the appellant." Ibid, p. 173.

In the present case the exceptions to the Master's report only raised the question whether the former decision of this court was

applicable to all the warrants issued in discharge of the consideration of the agreement of purchase and compromise, or should be limited to the particular warrants supposed to have been given for the dredge boats and machinery. The purpose sought to be accomplished was to induce the Master and the lower court to evade the decision of your Honors, and to come to a different conclusion upon the same issues of law and fact previously determined against the city in the Warner appeal, on the theory that your Honors meant to limit your rulings to warrants given for the price of the dredge boats and machinery, although it is admitted that the warrants then before you were, according to the theory of the city, given in part settlement of the claim for damages.

As the case of the intervenors was tried before the Master and the lower courts upon the answer to the Warner bill, and the exceptions not presenting any new defenses, these courts were bound to obey the mandate of your Honors, and to make a decree in conformity to your opinion. They had no power to open the controversy decided by this court, to a new contention upon the same record, as if it had never been passed on by this court. So far as Warner is concerned, the lower court could not allow an amendment to the pleadings to let in a new ground of defense for the purpose of evading the mandate of this court.

Gaines vs. Rigg, 148 U. S. 228.

As to the intervenors it may be conceded that their claims were open to any special defenses not at issue or decided in the Warner appeal. No special defenses were presented, however, this case having been decided on the original bill and answer, and the same evidence offered against the Warner warrants. The arguments now made only are different, but they would have been equally applicable to Warner.

This court having decided every question of law and fact raised by the pleadings filed in the court below, those courts simply did their duty in entering a decree in accordance with the opinion of your Honors, as expressed in the former appeal. The lower courts could not rightfully evade the decision and come to

a different conclusion from your Honors upon the same issues of fact and law, if they had been inclined to do so. They were not at liberty to permit a plea to be filed after the case was remanded by this court, raising new questions of law, but were bound to enter and execute the decree as directed in the mandate.

Coffin vs. Taylor, 116 U. S. 567.

They could not review the decision of this court and evade its application on any theory that this court made an error in its rulings. Even your Honors will not do this. Says the court, in Clark vs. Keith, 106 U. S. 464, "it has long been settled that whatever has been decided here on one writ of error, cannot be re-examined on a subsequent writ of error brought in the same suit," citing Supervisors vs. Kennicott, 94 U. S. 498.

III.

But if we are wrong in these contentions, and if it shall appear to the court that the case of the intervenors was open upon the same issues of fact and law decided by this court on the Warner appeal, to a new and a different judgment in the Courts below, and that the city was entitled to import new defenses into the record by the assignment of errors filed in the Court of Appeals, and to have them considered and passed on, we still insist that the decree appealed from is correct.

These defenses are: (1) That Act No. 16 of 1876 did not authorize the city to compromise or settle the claim for damages which entered into the consideration of the agreement under which the warrants in dispute were issued; (2) that if the Act gave such authority, it was upon the condition precedent that there should be an appraisement, which was not complied with by the city, as to damages and misappropriation of drainage taxes, to that extent rendering the agreement invalid.

The two Sections of Act No. 16 of 1876, involved in these contentions, are in the following words:

SECTION 1. "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE

OF LOUISIANA IN GENERAL ASSEMBLY CONVENED, THAT THE COMMON COUNCIL OF THE CITY OF NEW ORLEANS IS HEREBY AUTHORIZED AND EMPOWERED TO TRANSACT AND CONTRACT WITH THE MISSISSIPPI AND MEXICAN GULF SHIP CANAL COMPANY, AND THE TRANSFEREE THEREOF, FOR THE PURCHASE AND SETTLEMENT OF ALL OR ANY RIGHTS, FRANCHISES AND PRIVILEGES CREATED, AUTHORIZED OR ARISING IN FAVOR OF SAID COMPANY OR SAID TRANSFEREE UNDER AND BY VIRTUE OF ACT No. 30 OF ACTS OF 1871; ALSO FOR THE PURCHASE AND TRANSFER TO THE CITY OF NEW ORLEANS OF ALL TOOLS, IMPLEMENTS, MACHINES, BOATS AND APPARATUS BELONGING TO SAID COMPANY, OR ITS TRANSFEREE, AND BY IT OR HIM USED FOR OR PERTAINING TO DRAINAGE WORK AUTHORIZED TO BE DONE BY SAID ACT 30."

SECTION 2. "BE IT FURTHER ENACTED, ETC., THAT SHOULD IT BE DEEMED ADVISABLE BY SAID COUNCIL TO MAKE SUCH PURCHASE AND SETTLEMENT, IT SHALL BE THE DUTY OF SAID COUNCIL OF THE CITY OF NEW ORLEANS TO PROVIDE, BY ORDINANCE, FOR THE APPOINTMENT OF APPRAISERS TO ESTIMATE THE VALUE OF THE RIGHTS AND THINGS TO BE PURCHASED OR SETTLED FOR, AND THE DUTIES AND POWERS OF SAID APPRAISERS SHALL BE SPECIFICALLY ASSIGNED IN SAID ORDINANCE."

Pursuant to this Statute, the following ordinance was adopted by the city:

"BE IT ORDAINED, THAT IN ACCORDANCE WITH THE PROVISIONS OF ACT 16, APPROVED FEBRUARY 24, 1876, THOMAS S. HARDIE, CITY SURVEYOR, BE AND HE IS HEREBY AUTHORIZED AND INSTRUCTED TO MAKE A THOROUGH EXAMINATION

OF THE CONDITION AND VALUE OF ALL THE DREDGE BOATS, MACHINERY, TOOLS AND APPURTENANCES BELONGING TO THE MISSISSIPPI AND MEXICAN GULF SHIP CANAL COMPANY, OR TRANSFEREE, AND USED FOR THE EXCAVATING OF CANALS OR BUILDING PROTECTION LEVEES, MAKING A REPORT TO THE COMMITTEE OF THE WHOLE, TOGETHER WITH A STATEMENT OF ALL INFORMATION IN THE POSSESSION OF HIS OFFICE, CONCERNING DAMAGES CLAIMED BY SAID MISSISSIPPI AND MEXICAN GULF SHIP CANAL COMPANY, OR THE TRANSFEREE THEREOF."

As to the first contention, it seems perfectly clear that the authority of the city to compromise and settle these claims for damages and for misappropriation of drainage taxes was granted in terms quite as explicit as is usually done in legislative acts.

The city was authorized to transact and contract with the Canal Company and its transferee for the purchase and settlement of the rights, franchise and privileges, created, authorized or arising in favor of the Canal Company and its transferee, under and by virtue of Act 30 of 1871, and also to purchase all tools, implements, machines, boats and apparatus belonging to the Canal Company or its transferee.

The rights to be compromised and settled for consisted: (1) Of the franchise of the Canal Company, created by the Act of 1871, under which it was entitled to prosecute the work of drainage, and to receive the compensation therefor fixed by that Act. (2) Of the damages which the Canal Company was entitled to claim in case the city should fail to promptly locate the lines of the canals and protection levees, as provided in Section 6 of the Act. (3) Of the right to require the city to deposit all drainage taxes to the credit of the Canal Company, and to apply the same to the payment of the work done by the Company, as provided by Section 9 of the Act.

Considering that the purpose of Act 16 of 1876 was to permit the city to take charge of the drainage work then being carried on by the transferee of the Canal Company, and that this could only be done by coming to a settlement with the contractors by a compromise of their claims; the word "transact" in the Act was intentionally used to enable the city to accomplish that purpose. The word is not one in common use by laymen, being derived from the civil law in purely legal matters. Thus, under the title "of Transaction or Compromise," Article 3071 of the Civil Code of Louisiana declares that "a transaction or compromise is an agreement between two or more persons who, for the purpose of preventing or putting an end to a law suit, adjust their differences by mutual consent."

The language of the Act was certainly broad enough to enable the city to compromise and settle any claim for damages arising out of the execution of the drainage contract under the Act of 1871. Indeed, this court has already given this construction to Section 1 of the Act, in New Orleans vs. Warner, 175 U. S. 120. The learned Master came to the same conclusion in his report (R. p. 106), which was not excepted to by the city. But in our view of the matter it is not necessary to show that the word "transact," as used in the Statute, is the equivalent of the word compromise, for the Section also authorized the city to "contract" for the settlement of the rights of the Canal Company and its transferee, which, being an unlimited power, was sufficient to authorize the city to compromise those rights.

In commenting on this Statute in New Orleans vs. Warner, 175 U. S. 145, in response to the argument of counsel for the city, this Court said: "The Act of 1876 authorized the purchase and settlement of the claims against the city, and provided for the appointment of an appraiser to estimate the value of the rights and things to be purchased or settled for. This appraiser was appointed and appraised the dredge boats and machinery at $153,750, being 25 per cent. less than the original cost. He announced himself unable to come to a conclusion with reference to the

damages claimed. It must be borne in mind that the consideration of $300,000 was fixed upon, not only to cover the property of the plant, but the exclusive franchise under the Act of 1871, and the claims for damages against the city." If this was the law of the case then as to Warner, it is the law now as to the intervenors who hold warrants of the same class, now alleged to have been given for damages. The former opinion of this court is, therefore, conclusive on the construction of the first Section of the Act of 1876.

We now come to the construction of the second Section of the Act of 1876, which it is claimed, for the first time, required an appraisement of the damages, as a condition precedent to the exercise of the authority granted by the first Section. It is to be noted again here, that neither the answer to the Warner bill, nor the exceptions filed before the Master and in the Circuit Court, deny that an appraisement was, in fact, made, or allege that, as made, it was defective, irregular or void. In fact the answer admits, without disparagement or qualification, that the agreement of purchase and compromise was made, and that all the warrants were issued under authority of the Act of 1876 (R. p. 24), and the exceptions merely protest by way of argument that the intervenors are not entitled to the advantages of your Honors' decision, but set up no special or new defenses. The only complaint against the regularity of the appaisement, as we have shown, was imported into the record by the assignment of errors filed in the Court of Appeals, which has been renewed here.

It is admitted in this assignment of errors that the appraisement of the dredge boats and machinery, made by Hardee, city engineer, was sufficient, and that the first warrants, numbered from No. 313 to 333, supposed to have been issued therefor, up to $153,750, are valid and binding on the city, but it is claimed that the balance of the warrants, numbered from 333 to 402, amounting to $146,250, supposed to have been given for damages and misappropriation of drainage taxes, are void, because these claims were not appraised. The second Section of the Act which directs

the city to appoint appraisers to estimate the value of the things to be purchased and settled for, it seems to us is an anomaly in legislation, and it is difficult to understand why it was inserted. The city was to appoint appraisers of its own selection, without the concurrence of the other party to the transaction, and to prescribe their duties; but neither by the Statute, nor by the ordinance adopted pursuant thereto, was the estimate of values made binding on any one. The sum to be paid was not to be fixed by the estimate of the appraisers, and it could not be, without withdrawing from the city the power granted by the first Section of the Act, to compromise the claims of the Canal Company and its transferee.

The important and material object to be accomplished was to enable the city to acquire the drainage plant, and to obtain a discharge of the claims of the contractor named in Act of 1871, which it was foreseen could only be accomplished by a compromise. This was, no doubt, the reason why the Statute did not provide that the estimates of the appraisers should fix the sum to be paid, as a condition precedent to the validity of the purchase and compromise, as it would have done, if appraisement had been considered a material or essential feature of the transaction. Appraisement was not of the essence of the act authorized by the Statute to be done by the city, for, under the power to compromise, the city was at liberty to pay more or less than the estimated value of the things purchased and settled for. And not being of the essence of the act to be done, it was not one of those conditions precedent, the non-observance of which will render what is done void, unless it is specially so declared in the Statute. The provision of the Statute as to appraisement was, therefore, directory merely, and not mandatory. As we construe this provision of the Statute, its sole purpose was to suggest to the city the appointment of some person who should be qualified to examine into the condition and value of the tangible property, and into any claims the contractors might have arising our of drainage operations under the Act of 1871. We are sustained in this construction by the law itself which left it entirely to the city to prescribe his duties.

The Statute was merely advisory in character, and not intended to either limit the power of the city, or control its discretion. It is within that class of statutes referred to in French vs. Edwards 13 Wall. 506, where the court said: "There are, undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations prescribed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that assigned." Here the rights of no one were to be affected, not even those of the city, which was not bound to adopt the estimate of the appraisers in arriving at the sum it was willing to pay.

The most familiar class of cases in which Statutes directing particular acts to be done are to be treated as mandatory, are those in relation to the assessment of taxes. Tax laws are given this affect because they directly affect the rights of the tax-payer.

Lyon vs. Alley, 130 U. S. 178.
Torry vs. Milbury, 21 Pick. 64.
Sandwich vs. Fish, 2 Gray, 298.
Cooley on Taxation, 216.

These distinctions between directory and mandatory statutes have long been recognized in the jurisprudence of Louisiana, the courts adopting the rule laid down in *French vs. Edwards.*

By a law passed in 1882, municipal corporations were authorized to subscribe to the capital stock of corporations formed to carry on works of public improvements. The third Section provided that no ordinance authorizing such subscriptions should be valid until ratified by a majority of the voters whose property was subjected to taxation; and that the municipal corporations should prescribe the manner of holding the election, and should cause to be furnished to the Commissioner of Election a properly certified

list of the voters, etc. The election was held, but the commissioners were not furnished with a list of voters. Upon being sued by the city for a tax assessed to pay the subscription, a tax-payer pleaded this non-observance of the law as a defense. But the court held the statute directory as to the list of voters, and upon authority cited from cases in England and this country, maintained the validity of the tax.

City of New Orleans vs. Romes, 9 A. 573.

So it has been held that a statutory provision fixing the time within which an act shall be done, is directory merely, and that it may as well be performed afterwards, provided that the rights of no one be lost or prejudiced thereby.

Bell vs. Taylor & Houston, 37 A. 56.

The distinction between directory and mandatory statutes is fully recognized by the courts in most, if not all, of the States of the Union. Where the act to be performed is not of the essence of the thing to be done, and there is no direction, express or implied, that its non-observance shall avoid the transaction, the provision of the statute is considered by the courts of nearly all the States as directory merely.

The People vs. Supervisors, 34 N. Y. 268.
Southerland on Statutory Const., Sect. 446.
Enderlich on Statutory Const., Sect. 436.
Am. & Eng. Enc. of Law, 23rd Vol. 453-8.

The difference of opinion which may be found in the decisions in other States, do not concern us in this case, as the Courts of Louisiana are in full accord with the rule laid down in French vs. Edwards, 13 Wall. 506, quoted *supra*. In none of the cases in the brief for the city is the question discussed or decided.

In the case of McCracken vs. San Francisco, 16 Cal. 620, a sale of real estate made by the city was declared void because the ordinance was not passed by a legal vote of the Council. In Murphy vs. Napa Co. 20 Cal. 102, a contract for extra work was declared void because it was not authorized by an ordinance based on bids invited by advertisement. In French vs. Tachemacher, 24 Cal.

550, the question decided was whether an Act of the Legislature, authorizing a subscription to bonds in aid of a railroad, was constitutional, and it was decided in the affirmative. In Herzo vs. San Francisco, 33 Cal. 145, the Court held that city was not liable to refund the price paid for the real estate involved in 16 Cal. 620, upon failure of title. This decision is contrary to that line of cases holding a municipal corporation liable to refund money unduly received, in an action for money had and received. In McCoy vs. Briant, 53 Cal. 249, the court held the city not liable on bonds issued by the clerk of the Council without the authority of an ordinance, the Statute requiring that they should not be issued without the authority of a resolution of the Council. Most of these decisions were delivered by the late Mr. Justice Field, then on the Supreme bench of California, who was the organ of this court in French vs. Edwards.

The case of Addis vs. City of Pittsburg, 85 Pa. 379, the Court held that where the law requires a contract for municipal work to be let to the lowest bidder, after advertisement, and this is not done, a tax-payer is not bound for an assessment made to pay for the cost of the work. So in Leavenworth vs. Rankin, 2 Kan. 370, it was held that a contract for grading streets was void, if not petitioned for by a majority of the property owners, as required by law. To the same effect in the case of Durango vs. Pennington, 8 Colorado, 259.

The case of Worthington vs. Covington, 82 Ky. 265, involved the validity of assessments against property owners to pay for a street improvement, which was denied because the contract had not been submitted to a committee of the Council.

IV.

If the statute directing an appraisement was mandatory, as contended by the city, we submit that its requirements were substantially and sufficiently complied with.

It seems to us that the law contemplated an appraisement of the tangible property only, and that the city, in the exercise of its

authority to prescribe the duties of the appraiser, did not err in requiring him only to report the facts on which the claim for damages was based.

Appraisement fairly implies the examination of something that can be seen and estimated by the appraiser, who is supposed to have some special knowledge of the thing to be appraised; whereas the value of a claim for damages, or of the claim for the misappropriation of taxes, involved many collateral considerations beyond the view of an appraiser, which could only be determined by the parties in interest.

But we think the appraiser actually estimated the claim for damages when he reported to the city the amount that each dredge boat, which had remained idle on account of the fault of the city, was capable of earning while unemployed, "as a fair estimate of what they would have earned and been entitled to in cubic yards for the whole period of delay." They would have earned the contract price of excavating 149,445 cubic yards at 50 cents per yard, and 50 cents per yard for placing the same in the levees, as allowed by Section 8 of the Act of 1871.

Id certum est, quod certum reddi potest.

The most that can be said is that the appraisement was informal. But as was said by the Supreme Court of Louisiana, in a suit to annul a judicial sale, "unless the plaintiffs can show they have suffered injury by the informality complained of, they ought not to be permitted to attack the validity of the proceeding."

Mullan vs. Harding, 12 A. 563.

How could the city be injured, or in any manner affected by such an informality, in an appraisement, by which, if made in exact form, it would not be bound in fixing the amount to be paid on coming to a settlement and compromise with the transferee of the Canal Company?

V.

That the agreement under which the warrants were issued was in legal effect a compromise of the claims of the transferee of the

Canal Company against the city, as well as a transfer of property, is perfectly clear. It transferred the dredge boats and machinery and the rights, franchises and contracts of the Canal Company, and its assignee, in consideration of the warrants issued, and released, the claim against the city for damages.

This was a mutual settlement of all differences between the contracting parties made pursuant to the statute which authorized the transaction. It was none the less a compromise, although that particular word was not used, and there was no declaration in the agreement, in the language of the Civil Code, that it was made for the purpose of "preventing or putting an end to a law suit," for, in Louisiana, the character of a writing, as elsewhere, is fixed by its evident purpose, and the object sought to be attained by the contracting parties.

Antoine vs. Smith, 40 La. A. 560.

Article 3078 of the Civil Code of Louisiana declares that "transactions have, between the interested parties, the authority of the thing adjudged. They cannot be attacked on account of any error in law, or any lesion."

Article 3079 provides that "a transaction may be rescinded notwithstanding, whenever there exists error in the person, or in the subject matter in dispute. It may likewise be rescinded in cases where exists fraud or violence."

The effect of these Articles of the Code was fully considered in the case of Oglesby vs. Attrill, 105 U. S. 611, in which the Court says: "The compromise stands, therefore, as a judgment making a settlement of the matter now set up as grounds of complaint in the petition of reconvention. No allegations in addition to those made in the settlement can prevent the compromise having effect as a judgment therein. It may, indeed, by a direct proceeding instituted for that purpose, be rescinded for fraud, but it cannot, any more than any other judgment, be attacked collaterally. Adler vs. Proudholm, 16 A. 343."

Under these established rules of law, the city cannot, in this

case, be heard to complain in a collateral way, that the consideration of the agreement was inadequate, or that the agreement was executed in error of law, or fact, and certainly not when these are not pleaded as defenses.

The amount allowed in the settlement on the claims for damages, if any was in fact allowed, is not shown by the proofs. But conceding that the agreement included some damages, their inclusion, at most, was an error of law which is not a ground of rescission. And if it can be assumed, as the city says it ought to be, that $146,250 of the amount paid by the city in warrants under the agreement, represented damages, which were not lawfully allowed, and the city received less than one-half of the assumed value of the warrants, there was lesion, which does not, any more than error of law, afford ground of avoiding a compromise, even in a direct action.

But if the whole transaction were now open for investigation and revision, and the Court could substitute its judgment for that of the city, and make a new contract for the parties, what could it do? It would be bound to find, in any event, that, to the extent of $153,750, value of the dredge boats and machinery, as fixed by the city's own appraiser, whose integrity is not impeached, there was a real consideration for the agreement in money value. Could it find that the warrants, payment of which depended upon contingencies that might or might not happen, exceeded that amount in value at the time the transaction was made, in the absence of any averment or proof in the record as to what they were worth, and in the face of the self-evident fact that warrants of the character of those under consideration have no particular value as commercial paper?

May not the Court assume that the warrants, in reality, represented the value of the tangible property, and that the franchise was conveyed as a mere incident to the plant, and that the release of the claims for damages was an inducement to the purchase of the property and nothing more? And why should the Court impute part of the warrants to the claims for damages, and to the

supposed price of the franchise, in the absence of proof that these things were considered of any value by the parties who made the agreement, and in the face of the contention of the appellant that the damages were fictitious, and that the acquisition of the franchise was a burden rather than a benefit to the city? Having asked the Court to reduce the recovery on the warrants by nearly one-half, the burden was clearly on the city to show how much of the consideration of the contract represents damages, and the value of the franchise, to enable the Court to grant the relief prayed for, if it is entitled to any.

But we think it clear, on principle, that the city is not entitled to relief in the present form of action or in any other. The warrants were issued as a unit, in a lump sum, in discharge of the whole consideration of the agreement of compromise and sale, and cannot be apportioned to separate the several objects included therein. Therefore the city, if entitled to any remedy at all, should have brought suit to rescind the contract, setting up some legal grounds of action, such as that the contract was entered into by error of fact as to the subject matter induced by the fraud of the opposite party, and at the same time offer to restore what it had received.

Farmers Bank vs. Groves, 12 H. 51.
Gay vs. Adler, 102 U. S. 79.

A full rescission of the contract is the only way in which complete justice can be done between parties so situated.

But here it is manifest that the remedy cannot be invoked, because the drainage machinery, which the city has received, cannot be returned so as to restore the *statu quo*.

VI.

In the brief on behalf of the city it is contended that this Court ought now to re-examine its former decree, since we are asking for its execution, and see if it has not committed an error in its decision which ought to be corrected.

The Court is asked to violate the long established rule that whatever has been decided by an appellate court on one writ of error, cannot, in the same suit, be re-examined by the same appellate court, upon another writ.

Coffin vs. Taylor, 116 U. S. 567.

It is, no doubt, true that when the decree of a court of equity is so defective that it cannot be executed, and a new suit is filed to obtain another decree, the court may inquire into the correctness of the former decree, and make a new one in accordance with the real rights of the parties. This practice, however, is based upon the theory that the former decree is no more than an agreement under seal, which, if defective, a court of equity will enforce only according to right and justice. The application of this principle is well illustrated by the two cases cited in the brief of the city.

Thus in Gray vs. Parpart, 106 U. S. 679, the decree of partition contained no provision for a conveyance, *inter partes,* of the interest each was entitled to receive. It was a consent decree, and various agreements were subsequently entered into between the parties without consideration, and interests were acquired by third persons. After a lapse of twelve years, one of the parties brought a new suit to carry the old decree into effect. Under these circumstances it is evident a readjustment of the rights of the parties became absolutely necessary to meet the ends of justice.

In the case of Lawrence Manufacturingg Co. vs. Jonesville Mills, 138 U. S. 552, there was a consent decree which was so incomplete as to require the bringing of a new suit to carry it into effect. But as the court found that the former decree was erroneous, it refused to be bound by it as an adjudication, on the express ground, however, that it was the consequence of the consent of the parties, and not of the judgment of the court.

The rule recognized by these decisions extends only to cases where a *new suit* is brought to obtain the execution of a former decree, and has never been applied by the courts to the decrees of an appellate tribunal when sent down to be executed by the court

below in the same cause; for it cannot be that an inferior court has the right, or the power, to disregard the mandate of its superior and examine its decisions to see if an error has been committed. If this were so, it would be an idle ceremony for your Honors to render a decision in any case, or to issue a mandate. No case has been cited, and none can be found, in support of such a practice.

VII.

Thus far we have discussed the various questions as if, according to the theory of the counsel of the city, they were open in this appeal to a new contention, but we respectfully submit that the whole case has been passed on and decided by this court on the former appeal.

A reference to the bill of John G. Warner will show that it was brought by him, as the holder of three warrants, to enforce the agreement of sale and compromise between the city and the Canal Company and its transferee. The answer of the city practically admitted the validity of the agreement, and of the warrants issued in discharge of its consideration, by averring that "the General Assembly of the State of Louisiana, by Act No. 16 of 1876, was constrained to dispense with the services of the Canal Company, and its transferee, and to authorize the purchase by this defendant of the dredge boats, rights, franchises and other property of the company, for a price in drainage warrants, delivered to Warner Van Norden, payable only from drainage taxes, and this Act was followed by said purchase from and surrender of the franchises by said Company, and its assignees, as shown by said legislative Act, a copy of which is filed with the bill, to which reference is made" (R. p. 24). The only charge made in the answer, concerning the agreement, was that "all of the dredge boats and other property sold to it (the city) by Van Norden, were of little or no value, or, in any event, of a value infinitesimal as compared with the price paid for the same, and that the sale thereof for the price stipulated was a fraud upon this defendant and its tax-payers" (R. p. 32). This defense was

passed on and disposed of adversely to the city by this court, in New Orleans vs. Warner, 175 U. S. 120. All the other defenses set up in the answer went to the validity of the drainage assessments, and the liability of the city to account therefor. These were also decided adversely to the city.

When the holders of the rest of the warrants came before the Master, no special answer was filed to their claims, but they were considered to fall within and be subject to the defenses set up in the answer of the city to the Warner bill. Both parties submitted the claims of the intervenors upon the same proofs that had been used at the former hearing, and it followed, logically, that, as all the warrants were of the same class and kind as those of Warner, the Master, and the Circuit Court, and the Court of Appeals, should come to the same conclusion as this court did on the former appeal, notwithstanding the exceptions filed to the Master's report, that the intervenors were not entitled to the benefit of your Honors' decision. And it seems to us that your Honors must now, upon the same issues of law and fact, adhere to your former ruling. One argument of the city now is, that the two defenses now insisted on—want of authority in the city to compromise the claims for damages, and defective appraisement of the damages—were not presented to or passed on by this Court in the former appeal. This is true, but as we have shown these grounds of defenses were not set up in the defendant's answer. Nor have they been set up in any pleading in the record, to the claims of the intervenors, but were imported into the record for the first time by the assignment of errors filed in the Circuit Court of Appeals, and, therefore, cannot be considered here as grounds for reversal.

Another argument is that the benefit of your Honors' former decision should be limited to warrants issued for the purchase price of the dredge boats and machinery, although it is admitted that the Warner warrants are part of those that were given, according to a fanciful theory evolved by the learned counsel of the city, in part settlement for damages. This limitation it is as-

sumed, is to be inferred from the fact that this court, in the course of its written opinion in the former appeal, sometimes for convenience, referred to the Warner warrants as purchase warrants. But so did the city in its answer to the bill.

It seems to us that this kind of argument but trifles with the opinion of this court. If the lower court had attempted to execute the mandate of your Honors in this narrow and carping spirit, it would have been justly considered guilty of contempt and evasion of the authority of this court.

We think your Honors intended to decide, and did decide, every question in the case involving the validity of the agreement and of all the warrants as a unit, and that your opinion was too well and carefully considered to be now changed upon the suggestions and new arguments, based on pretended errors of the lower courts in their supposed rulings on issues and defenses not submitted to them, or passed on.

VIII.

There is no proof in the record to support the contention of the city that part of the warrants were issued in payment of the price of the tangible property, and part in settlement of damages, etc. On the contrary, it appears from the evidence of S. D. Moody, secretary of the Canal Co. (R. p. 114), and by the agreement, that they were all issued at the same time, and delivered to Van Norden as a unit. Nor is there any proof tending to show which of the warrants were signed first, although they are numbered consecutively from 313 to 402. Therefore it cannot be inferred that those numbered from 313 to 333 were given for the price of the tangible property, and the others for damages, etc., and that they were, for this reason, void, under the theory of the city.

But if part of the consideration of the agreement is rejected on the theory of the city, the amount rejected should be prorated and deducted from the face of all the warrants, and each warrant holder should receive a pro rata of the sum of $153,750, admitted

to be due. This sum should be treated as a trust fund for the benefit of all, and divided equally.

But no reduction should be made, in any event, on the warrants held by Wilder & Co., they having obtained a judgment in the Circuit Court, at law, against the city on warrants Nos. 341 and 402 aggregating $7,000, fixing the amount due them, which is *res adjudicata* (R. pp. 155 to 158). Nor should any deduction be made on the warrants Nos. 379, 386 and 381, aggregating $6,000, held by Anna Warner, Mary G. Warner, Harry Warner and Joanna McCrossion, substituted heirs of John G. Warner, their rights being fixed by the former decree in favor of John G. Warner, deceased, to whose interest they have succeeded as sole heirs at law. Moreover, no appeal has been taken from the separate decree in their favor, they not being named as appellees either in the motion for appeal (R. p. 149), or in the bond (R. p. 152). Nor should the several decrees recovered by John J. Donaldson, on warrant No. 399, for $2,000, be in any manner disturbed, as no appeal has been taken therefrom, his name not being mentioned either in the motion and order of appeal, nor in the bond.

We respectfully submit that the decree appealed from should be affirmed, and so pray.

J. D. ROUSE,
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JAMES H. McKENNEY

No. 281.

Add'l Brf. of Dr Grey for Respond

Filed Dec. 10, 1900.

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 281.

THE CITY OF NEW ORLEANS,
PETITIONER,

versus

ANN WARNER ET ALS., HEIRS AT LAW, ETC.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Additional Brief of Respondent on the Question of Whether the Notarial Act of June 7, 1876, was "a transaction or compromise" within the meaning of the Civil Code and the decisions of the highest Courts of Louisiana.

It is contended on the other side that "to transact" does not mean to compromise unless it is followed by the words "to compromise" and that no one familiar with the mode of drafting acts of compromise in Louisiana would ever think of using the words "transact" without following it with the word "compromise", etc.

In Antoine vs. Smith, 40 Ann., p. 560, the language was not near as definite as in the notarial act herein, especially on the

claim for damages and moneys collected and misapplied. The instrument in that case, which the court held was "a transaction or compromise" is found at page 568, and no where contained either of these words. It was as follows:—

> "In consideration for a note from David Dexter Smith, dated September 4th, 1884, for twenty-four hundred dollars ($2400), the surrender of a note which the said Smith holds against me for one hundred dollars, dated September 13th, 1876, and one hundred dollars in cash, I hereby surrender all claims I have to any Louisiana State Lottery stock on the books of said company in the name of David Dexter Smith. I further agree to relinquish all claims and considerations in every form against the estate of the late George Smith, deceased, also to pay any balance, if called for, that the estate of said Smith might be liable for by said George L. Smith's signature to my bond as Treasurer of the School Board for the city of Shreveport, parish of Caddo, State of Louisiana. This being a receipt in full for all demands in any form against the estate of the late George L. Smith, deceased, also any and all claims against David Dexter Smith."

Now compare this with the language used in the notarial act herein in reference to the settlement of the claim for damages (R. p. 39), and the settlement of the claim for drainage collections misapplied (R. p. 41). In reference to the former the following conclusive language was used:—

> "That said sum of three hundred thousand dollars in drainage warrants shall be paid in full to the said W. Van Norden, in consideration of the sales herein made, and also in full settlement of all existing claims for damages which the said Mississippi and Mexican Gulf Ship Canal Company and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name individually, ever had, or have now, or may have against the said city of New Orleans. And the said * * * Canal Company, through its president and secretary aforesaid, does moreover by these presents fully authorize the said city of New Orleans to pay the said sum of three hundred thousand dollars in drainage warrants, to the said * * Van Norden".

And in reference to the latter said notarial act declared:—

> "and that inasmuch as it has been claimed that certain col-

lections of drainage funds have been applied by the previous administrators to general fund purposes, the said city of New Orleans will issue to the said W. Van Norden the sum of twenty thousand dollars ($20,000) in drainage warrants in full satisfaction of the same."

In discussing said instrument in Antoine vs. Smith above referred to, the Supreme Court of Louisiana at page 563 said:—

"The provisions of the Code are that a transaction, or compromise is an agreement between two or more persons who, for preventing or putting an end to a law suit, adjust their differences by mutual consent, in the manner in which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. This contract *must* be reduced to writing." R. C. C. 3071.

"Our learned brother of the District Court declined to give effect *as a compromise* to the agreement in question, because it did not contain the phrase, for preventing or putting an end to a lawsuit."

"In *Calhoun vs. Lane,* 39 Ann. 596, we gave effect to an instrument as a compromise, which did not contain these formal words. We can see no good reason why their use should be deemed *essential.* Under our system of practice, nothing is sacramental as a matter of form, unless expressly so declared by statute. The instrument does not contain the phrase, 'and which every one prefers to the hope of gaining, balanced by the danger of losing,' which would seem to be equally important."

"In our view, the only *essential,* as a matter of form, which the article quoted requires is, that 'the contract *must* be reduced to writing.'"

"Without recapitulating the terms, provisions and conditions of the instrument, we hold it to be a transaction or compromise, in the sense of the Code, and was evidently intended for the purpose of *preventing* law suit."

"A transaction has 'a force equal to the authority of things adjudged.' R. C. C. 3878."

"A thing adjudged is said of that which had been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed for appealing is elapsed, or because it has been affirmed on appeal. R. C. 3556, No. 31."

And in response to the plea urged of the great disproportion of the amount received and the value of the property given up, the court said at page 269:—

"The law provides that a compromise cannot 'be attacked on account of error in law, or lesion.' R. C. C. 3078."

"In Davis vs. Lee, 20 Ann. 248, the court said that 'in transactions, as they are defined in the Code, and in the Roman law, there is, from the nature of such contracts, something aleatory.'"

"Pothier, in treating on this subject, says: 'There are certain agreements in which persons of full age are *not* entitled to restitution, be the injury *ever so considerable.* Such are compromises according to the edict of Francis II. These are agreements respecting pretensions upon which there are impending, or *expected* litigations * * * By the very nature of such agreements, the intention of the parties is the avoidance of litigation, even at the expense of what belongs to them.' Pothier Ob., p. 121 (36)."

In Long vs. Robinson, 5 Ann., the court said:—

"'The plaintiff seems to rely to establish both (of his demands) by *the large amount of his claim compared with the small sum of* $3000, *for which they were compromised.* But the Code expressly provides, that a compromise cannot be annulled on account of any lesion—Art. 3045; because it is an agreement to put an end to a law suit, and which the parties prefer to the hope of gaining, balanced by the danger of losing. Code, 3038.'"

"'The plaintiff is, therefore, not only unfounded in the opinion, that the sacrifice he made in the compromise is cause for its rescission, but the District Court properly refused to admit testimony of the value of the property and claims compromised.'"

The term "Lesion" above referred to is defined by the Civil Code of Louisiana as follows:—

"Art. 1860. Lesion is the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract. The remedy given for this injury, is founded on its being the effect of implied error or imposition; for in every commutative contract, equivalents are supposed to be given and received."

And commutative contracts are defined by said Code, Art. 1768, to be:—

"Art. 1768. Commutative contracts are those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given, or promised by the other."

While aleatory contracts are defined by the same Code as follows:—

"Art. 2982. The aleatory contract is a mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to one or more of them, depend on an uncertain event."

In Calhoun vs. Lane, 39 Ann., at page 606, the court said:—

"This kind of contracts" (transactions or compromises) "is clearly distinguishable from that in which equivalents are respectively given and received."

"It was correctly observed by our predecessors that 'in transactions as defined in the Code and in the Roman law, there is, from the nature of such contracts, something aleatory.' 20 Ann. 248.

* * * * * *

"In Long vs. Robinson, suit was brought to annul a transaction on the ground that there was great inequality in their respective shares and interests, and the court held that such a claim was unfounded, and declined to listen to evidence in support of it."

* * * * * *

"There is no precept of the law that requires evidence to support an act or compromise. This would of itself destroy its effects as a transaction. It could not then be said to have a force equal to the authority of things adjudged. It would then be deprived of its character as an unappealable judgment, and reduced to the rank of conventional obligations and commutative contracts. If it be necessary to prove *aliunde* that there was an *adequate* consideration, then it would *eo instanti* cease to be a compromise. If proof is necessary to show that the contract turned to her *advantage*, the provisions of the Code would be violated, and by its reception the jurisprudence would be trenched upon."

Respectfully submitted,

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